Supreme Court, U.S.
FILED
JUL 21 2000
CLERK

(2)

No. 99-2045

IN THE

Supreme Court of the United States

MAHFOUZ EL SHAHAWY,

Petitioner,

v.

SARASOTA COUNTY PUBLIC HOSPITAL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

FRANK STRELEC
Counsel of Record
DAVID A. WALLACE
WILLIAMS, PARKER, HARRISON,
DIETZ & GETZEN
Attorneys for Respondent
200 South Orange Avenue
P.O. Box 3258
Sarasota, Florida 34230-3258
(941) 366-4800

161080

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

16 pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Opinions Below	1
Statement of the Case	1
Summary of Argument	5
Reasons for Denying the Writ	7
I. The Decision Below Does Not Present An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By The Court.	7
II. The Petition Seriously Misstates And Omits Facts Critical For Meaningful Review.	10
Conclusion	13

TABLE OF CITED AUTHORITIES

Page

Cases:

Bryan v. James E. Holmes Regional Medical Center, 33 F.3d 1318 (11th Cir. 1994), *cert. denied*, 514 U.S. 1019 (1995) 8

Conway v. California Adult Authority, 396 U.S. 107 (1969) 11, 12

Lawler v. Eugene Wuesthoff Memorial Hosp., 497 So. 2d 1261 (Fla. 5th DCA 1986) 9

Shahawy v. Harrison, 875 F.2d 1529 (11th Cir. 1989) 2

Shahawy v. Harrison, 51 F.3d 1049 (11th Cir.), *cert. denied*, 516 U.S. 821 (1995) 2

United States v. Johnston, 268 U.S. 220 (1925) ... 10

Statutes:

42 U.S.C. § 11112 4

42 U.S.C. § 11112(a) 4

Florida Statutes § 395.0191 3

Rules:

FED. R. CIV. P. 50 9

SUP. CT. R. 10 ..... 6, 7, 10

OPINIONS BELOW

The District Court's Orders granting immunity from damages under the Health Care Quality Improvement Act ("HCQIA" or the "Act") are unreported. Although the Petition indicates that these Opinions are included in the Petitioner's Appendix, they were not included.

STATEMENT OF THE CASE

This case involves the denial of medical staff and clinical privileges to a physician, Mahfouz El Shahawy, M.D. ("Shahawy"), by a local governmental body, the Sarasota County Public Hospital Board (the "Board"). The Board operates a local public hospital, Sarasota Memorial Hospital (the "Hospital"). The litigation arises out of peer review within the Hospital. After formal hearings, the Hospital Board concluded that Shahawy's disruptive behavior presented too great of a risk of hindering the delivery of quality patient care at the Hospital. The Board denied Shahawy's application for restoration to the medical staff at the Hospital.

Although this case relates to Shahawy's 1991 application for privileges at the Hospital, disputes between Shahawy and the Hospital date back to the early 1980s. On October 31, 1983, the Board terminated Shahawy's membership on the medical staff at the Hospital. A major ground for the 1983 termination was Shahawy's disruptive behavior, specifically found to adversely affect the quality of patient care and orderly operation of the Hospital.

The Board's 1983 Order was challenged by Shahawy in a prior suit in the District Court, naming as Defendants the

Board, five Board members individually, twelve physicians, and two attorneys. After extensive litigation, that case ended in judgment for all Defendants. The Eleventh Circuit Court of Appeals held that termination of staff membership was supported by substantial competent evidence, *Shahawy v. Harrison*, 875 F.2d 1529, 1533-34 (11th Cir. 1989), although the antitrust claim was not disposed of until *Shahawy v. Harrison*, 51 F.3d 1049 (11th Cir.), *cert. denied*, 516 U.S. 821 (1995).

In January, 1991, while the case relating to his 1983 termination was still being litigated, Shahawy filed a new application for medical staff membership. After going through the peer review procedures prescribed by the medical staff by-laws, that application was denied by the Board in January, 1994. Again, Shahawy's disruptive behavior was a ground.

Shahawy filed two suits in state court, one against various then-current Board members, and the other a Petition for Certiorari to review the Board's denial. Those two state court cases went to mediation jointly, resulting in two settlement agreements and dismissal of both cases. Pursuant to the settlements, the peer review of Shahawy's 1991 application was reconvened with a hearing by two judicial review panels (instead of one) and was thus a partial deviation from the by-laws. The process was not, as the Petition states, "wholly" outside the by-laws. Pet. 7. Shahawy also received money as part of the settlements. The Petition erroneously describes this payment as "damages." Pet. 7.

Shahawy contended he was no longer disruptive, that he was a changed man. Both hearing panels agreed and recommended that Shahawy be reinstated.

On October 25, 1994, the Board held a formal hearing. Presentations were made by counsel. Dr. Fogelman, Chief of the Medical Staff, spoke on behalf of the Medical Executive Committee in opposition to granting Shahawy's application. At the conclusion of the hearing, Shahawy began addressing the Board and the Board Chairwoman directly. Shahawy persisted in demanding the names of the physicians on the Medical Executive Committee who had voted to oppose his application. He was told that his demand was prohibited by Florida Statutes section 395.0191, which statute affords confidentiality to the proceedings of peer review committees. When Shahawy's demand was properly denied by the Board Chairwoman, Shahawy exploded into a tirade (referred to herein as the "outburst"). At one point during this episode, Shahawy's attorneys asked for a brief recess to take Shahawy outside of the hearing room to speak with him. His counsel was unable to calm him. The outburst continued upon his return. Finally, the Chairwoman was able to adjourn the meeting.

On October 31, 1994, the Board met, reviewed the evidence, and voted six to two to deny Shahawy's application. The Board's final decision was issued on November 8, 1994.

The outburst was the primary reason for the Board's decision. In this regard, the history of Shahawy's relationship with the Hospital was significant. As pointed out above, the termination of his staff membership in 1983 was based on disruptive conduct. A finding of disruption also caused the January, 1994 denial of his application for reinstatement. So, on October 31, 1994, the question uppermost in the minds of the Board members was whether Shahawy's temperament had changed. Had Shahawy acquired the self-control that he had previously been lacking? Six Board members believed

that because Shahawy flew off the handle on October 25, 1994, there was too much probability that he would do so again and again. They decided they would be shirking their responsibility to future Hospital patients if they readmitted Shahawy to the medical staff.

This litigation followed. The case against the Board went to trial on three counts: a claim that the denial of Shahawy's application was in retaliation for his exercise of his First Amendment right of free speech, a claim that the denial of the application was on account of his Egyptian national origin, and a breach of contract claim relating to the settlement agreements. In addition, there were civil rights claims by Shahawy against five individual Defendants (past and present Board members who voted to deny Shahawy privileges) alleging discrimination based upon his national origin.

In its Order dated December 31, 1996, the District Court granted the Board's motion to establish HCQIA immunity from damages with respect to the breach of contract count, walking step-by-step through the immunity analysis under 42 U.S.C. § 11112. The District Court found that because the Plaintiff failed to rebut the presumptions of 42 U.S.C. § 11112(a), the Board was entitled to the immunity provided by the HCQIA. On motion for reconsideration, the District Court, by Order dated January 15, 1997, reaffirmed that the Board was entitled to immunity.

Trial before a jury commenced on January 6, 1997. At the conclusion of Shahawy's case in chief, the District Court granted the individual Defendants' and the Board's motions for judgment as a matter of law as to all of Shahawy's civil rights claims, including the claims alleging national origin

animus and discrimination. The court discharged the jury and proceeded with a bench trial on Shahawy's claim for equitable relief in the contract count. The District Court then held there was no breach of contract.

Judgment was in favor of all Defendants on all counts.

Shahawy did not appeal either his First Amendment claim against the Board or his national origin discrimination claims against either the Board or the individual Defendants to the Eleventh Circuit. His appeal related only to the Health Care Quality Improvement Act immunity and the breach of contract claim.

Once the judgment with regard to the unappealed claims became final, and despite the heightened standard that must be met by Defendants seeking attorneys' fees in connection with civil rights claims, the District Court awarded fees and costs in excess of $450,000.00 in favor of the Board and the individual Defendants against Shahawy, finding that Shahawy had "conjured up" his civil rights claims. With regard to the ethnic and national origin slurs allegedly used against Shahawy, the District Court noted that, at trial, "the slurs could hardly be recalled, much less attributed to any certain time or any particular individual, much less a Board member . . ." Shahawy has appealed the attorneys' fees award to the Eleventh Circuit.

SUMMARY OF ARGUMENT

Shahawy's Petition for Certiorari should be denied.

No important question of federal law that should be decided by this Court is presented by the Petition. The

District Court completely, thoroughly, and properly analyzed the issues under the HCQIA. The HCQIA is applicable because Shahawy's peer review process was a professional review action under the Act. The settlement agreements did not waive the applicability of the HCQIA, and the HCQIA is regularly applied to circumstances involving contracts. The HCQIA immunity did not operate to prevent Shahawy from attempting to prove his separate civil rights claims.

The Petition creates a misleading picture of the case below by mischaracterizing or omitting facts critical for meaningful review. Shahawy improperly and inaccurately suggests that he was denied the opportunity to present his evidence of racial or national origin bias to a jury. Shahawy presented his discrimination evidence to a jury, he simply failed to prove his civil rights claims. Shahawy also omitted crucial facts with regard to his history of disruptive behavior and his conduct at the Board's formal hearing on October 25, 1994, from his Petition. This mischaracterization and omission of facts is sufficient grounds to deny the Petition.

With Supreme Court Rule 10 as a guide, the Petition presents no reason why this Court should accept review.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT.

This case presents no important question of federal law that should be settled by this Court. The issues presented are significant only to the parties to the proceeding. There is no national interest to be served, and no policy determination to be made here.

Shahawy attempts to create the illusion of an important question of federal law by asserting that the Health Care Quality Improvement Act was improperly used to shield all manner of egregious conduct. In fact, the Health Care Quality Improvement Act was carefully, methodically, and properly applied to the facts of this case by the District Court judge. Shahawy's real issue here is not with the law or with the legal analysis, but instead with the factual determinations that have been made. As Supreme Court Rule 10 provides, "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Shahawy suggests that the HCQIA immunity should not have been granted in this instance because a "voluntary settlement agreement" is involved. Pet. 2. Although Shahawy states that "simple logic" compels a determination that the Hospital Board must have waived HCQIA immunity as part of the settlement, he cites no authority for this proposition

and fails to explain this "logic." Pet. 2. There is nothing in the HCQIA that would bar its application to a situation involving a settlement agreement. The Health Care Quality Improvement Act was applicable here because a professional review action, as defined by the Act, was involved. The District Court made the determination that Shahawy's peer review was a professional review action. Shahawy did not take issue with that particular determination in the Eleventh Circuit. Further, the Eleventh Circuit held, "As the district court observed, [Shahawy] has not pointed to anything in the settlement expressly or by necessary implication waiving HCQIA immunity." Pet. App. 2a. This Court should have no interest in re-examining whether the particular contracts between these two parties waive immunity.

Shahawy also asserts that because contracts (the settlement agreements) are involved, Health Care Quality Improvement Act immunity should not have been afforded because immunity may undermine the implied obligation of good faith and fair dealing in contracts. Pet. 5-6. Shahawy's apparent suggestion is that this is a unique circumstance which merits this Court's attention. There is nothing unusual in the application of the HCQIA to a circumstance involving a contract. In fact, there is frequently a contract involved where the Health Care Quality Improvement Act is applied. For example, in *Bryan v. James E. Holmes Regional Medical Center*, 33 F.3d 1318 (11th Cir. 1994), *cert. denied*, 514 U.S. 1019 (1995), the Eleventh Circuit reversed a jury verdict against a Florida hospital on a breach of contract claim because the hospital was entitled to HCQIA immunity. The contract in *Bryan* was the medical staff by-laws. Medical staff by-laws have been found to be contracts between the physician and the hospital in most states, including Florida.

See Lawler v. Eugene Wuesthoff Memorial Hosp., 497 So. 2d 1261 (Fla. 5th DCA 1986). The contractual setting is not unique and does not present an important question of federal law that should be considered by this Court.

Shahawy makes passing reference to his civil rights claims in the Petition. Pet. 3. However, the Petition, including the Question Presented, is otherwise written so as to create the inaccurate impression that, because of Health Care Quality Improvement Act immunity, Shahawy never received his "day in court" with respect to his allegations of racial and ethnic animus on the part of the Board and Board members. Nothing could be further from the truth. In fact, Shahawy's national origin discrimination claims against the Board and Board members were fully litigated before a jury. Shahawy lost those claims on the Rule 50 motions by the Board and individual Defendants, and Shahawy chose not to appeal as to those counts. Further, Shahawy has been ordered to pay costs and attorneys' fees to the Board and the individual Defendants with regard to the civil rights claims. Undaunted, Shahawy, in his Petition, treats the allegations of racial and ethnic animus as established fact. He attempts to bootstrap his Health Care Quality Improvement Act argument before this Court to the failed civil rights claims.

The Petition, moreover, suggests that the discrimination allegations were central to Shahawy's contract claim and to the dispute regarding Health Care Quality Improvement Act immunity. A review of the District Court Order disposing of the contract claim and the Orders granting immunity display otherwise, and the discrimination allegations received only scant mention in Shahawy's briefs to the Eleventh Circuit.

The Health Care Quality Improvement Act immunity, of course, related only to the breach of contract claim and did not extend to the civil rights counts. Thus, contrary to Shahawy's assertions, the Health Care Quality Improvement Act immunity did not "disguise transparent racial and ethnic bigotry." Pet. i. Shahawy had every opportunity to present his civil rights case, and he did so. The facts simply did not support Shahawy's allegations of national origin bias. Shahawy's reckless and unproven allegations of discrimination do not transform the District Court's Health Care Quality Improvement Act determination into an important question of federal law that should be considered by this Court.

Supreme Court Rule 10 provides the necessary framework for the analysis of Shahawy's Petition. He has not alleged conflict between the Eleventh Circuit's decision and that of another United States Court of Appeals or a state court of last resort. As the above discussion demonstrates, no important question of federal law is presented. When one carefully analyzes Shahawy's Petition, his asserted error relates to "factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10.

II.

THE PETITION SERIOUSLY MISSTATES AND OMITS FACTS CRITICAL FOR MEANINGFUL REVIEW.

This Court is not in the business of canvassing the record in each case to discern the central facts or to correct the mischaracterization thereof. "We do not grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925), yet, Petitioner herein

asks the Court to do exactly that by misstating, mischaracterizing, and omitting facts critical for review. Such misconduct is a sufficient reason for denying certiorari. *Conway v. California Adult Authority*, 396 U.S. 107, 110 (1969).

As referenced above, the Petition is written, and the Question Presented is framed, so as to suggest that the granting of Health Care Quality Improvement Act immunity shielded the Board from Shahawy's allegations of discrimination and prevented Shahawy from presenting that case to a jury. The Petition is extremely misleading as to this subject.

Shahawy also glosses over and mischaracterizes his outburst at the October 25, 1994 meeting, and fails to give the necessary historical context of the prior findings with regard to his disruptive conduct. The District Court's analysis emphasizes the "outburst," linking it to other relevant evidence of disruption. The District Court found that

> the record before the Board contained significant evidence to support the conclusion that Plaintiff was abrasive and disruptive in a manner which both had affected and could in the future affect the rendering of patient care at the Hospital . . . Plaintiff's behavior at that meeting clearly shows that Plaintiff was unable to comport himself well in situations involving interaction with his medical colleagues and the Hospital administration.

Pet. App. 27a. The issue of Shahawy's disruptive behavior was a central one below. Shahawy's dismissive treatment of that subject in his Petition is misleading.

There was a dispute below as to whether the Board was obligated under the settlement agreements to apply a "presumption of correctness" to the two decisions of the panels. The District Court did not decide that dispute but instead assumed that the Board was obligated to apply a presumption of correctness, inasmuch as there was clear and convincing evidence overcoming the presumption. Pet. App. 17a. Shahawy neglects to mention the District Court's treatment of this subject in his Petition.

Further, throughout the Petition Shahawy asserts that his peer review process was "materially" or "wholly" outside the Board's by-laws. Pet. 2, 7. Although Shahawy's peer review pursuant to the settlement agreements did deviate to some degree from the by-laws (for example, Shahawy was afforded two judicial review panels instead of one), Shahawy overstates the point in an apparent effort to suggest that HCQIA immunity was not appropriate. The by-laws were applied where there was not an express deviation called for in the settlement agreements. The District Court describes the process as "modified" but "substantially within" the by-laws. Pet. App. 18a-20a.

Although the Petition makes other misrepresentations and omissions, the foregoing suffice to illustrate the nature of Petitioner's allegations. These allegations will make difficult a decision by this Court on the basis of the *actual* facts below. Such is a significant reason for denying certiorari. "Were we to pass upon purely artificial and hypothetical issue tendered by the petition for certiorari we would not only in effect be rendering an advisory opinion, but also lending ourselves to an unjustifiable intrusion upon the time of this Court." *Conway*, 396 U.S. at 110.

CONCLUSION

For the foregoing reasons, Respondent respectively requests that this Honorable Court deny the Petition.

Respectively submitted,

FRANK STRELEC
Counsel of Record
DAVID A. WALLACE
WILLIAMS, PARKER, HARRISON,
DIETZ & GETZEN
Attorneys for Respondent
200 South Orange Avenue
P.O. Box 3258
Sarasota, Florida 34230-3258
(941) 366-4800